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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

KIN/143921

PRELIMINARY RECITALS

Pursuant to a petition filed September 19, 2012, under Wis. Stat. § 48.57(3m)(f), and Wis. Admin. Code § DCF 58.08(2)(b), to review a decision by the Perez-Pena Limited in regard to Kinship Care, a hearing was held on October 25, 2012, at Milwaukee, Wisconsin.

The issue for determination is whether the agency correctly determined that Petitioner is not eligible for Kinship Care benefits.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

Department of Children and Families
201 East Washington Avenue
Madison, Wisconsin 53703

By: Stephanie Purpero, of Perez Pena on behalf of
Bureau of Milwaukee Child Welfare
1555 Rivercenter Drive
Milwaukee, WI 53212

ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County.
2. Petitioner filed this appeal to contest the discontinuance of her Kinship Care benefit for her maternal grandchild, SB.
3. The record here as to Petitioner's eligibility history for Kinship Care benefits for SB is not clear. It appears that she was receiving Kinship Care benefits when the agency received information from the economic support agency in Milwaukee that indicated that the biological mother of the SB had an open FoodShare and Medicaid case listing Petitioner's address. This led to a reassessment of Petitioner's eligibility for Kinship Care.

4. The agency determined that Petitioner was not eligible for Kinship Care benefits because it concluded that SB was not a child in need of protection or services based upon a determination that the biological mother was residing with Petitioner.
5. There was an effort by Petitioner to obtain a guardianship over SB however that failed because the court decided that the biological mother could retain custody of SB. The final hearing for that guardianship was apparently in January 2012.
6. The father of SB is not involved in her life; his whereabouts are unknown but it is apparent that he suffered from mental illness.
7. The agency had no contact with the biological mother.

DISCUSSION

The Kinship Care benefit is a public assistance payment of \$220 per month per child paid to a qualified relative who bears no legal responsibility to support the child. In Wisconsin, this benefit replaces the former Non-Legally Responsible Relative (NLRR) Aid to Families with Dependent Children (AFDC) payment. To be eligible for the payments, the relative must meet all of the conditions set forth in *Wis. Stat. §§ 48.57(3m)(am)(1-5) or 48.57(3n)(am)(1-6)*. Subsection (3m) concerns Children in Need of Protection or Services (CHIPS) and subsection (3n) concerns guardianship cases.

For a guardianship based Kinship Care application under statutory subsection (3n) the Wisconsin Administrative Code further requires that the Kinship Care applicant provide proof that they have been named as guardian under *§48.977, Stats.; Wis. Admin. Code, §DCF, 58.15*. In this case, there is no Chapter 48 guardianship so I cannot find that Petitioner is eligible to receive Kinship under guardianship provisions.

This decision must still decide whether Petitioner's case meets CHIPS based Kinship Care eligibility criteria. The Statutes require that:

...A county department and, in a county having a population of 500,000 or more, the department shall make payments in the amount of \$215 per month to a Kinship Care relative who is providing care and maintenance for a child if all of the following conditions are met:

1. The Kinship Care relative applies to the county department or department for payments under this subsection and the county department or department determines that there is a need for the child to be placed with the Kinship Care relative and that the placement with the Kinship Care relative is in the best interests of the child.
 2. The county department or department determines that the child meets one or more of the criteria specified in s. 48.13 or 938.13, that the child would be at risk of meeting one or more of those criteria if the child were to remain in his or her home or, if the child is 18 years of age or over, that the child would meet or be at risk of meeting one or more of those criteria as specified in this subdivision if the child were under 18 years of age.
- §48.57(3m)(a)2(am), Wis. Stats.*

The *Wisconsin Administrative Code*, at *§DCF 58.10(1)*, describes the "need" for placement as follows:

- (a) The child needs the kinship living arrangement. The agency shall determine that the child needs the kinship living arrangement by determining at least one of the following:
 1. The child's need for adequate food, shelter and clothing can be better met with the relative than with the child's parent or parents.
 2. The child's need to be free from physical, sexual or emotional injury, neglect or exploitation can be better met with the relative than with the child's parent or parents.

3. The child's need to develop physically, mentally and emotionally to his or her potential can be better met with the relative than with the child's parent or parents.
4. The child's need for a safe or permanent family can be better met with the relative than with the child's parent or parents.

It must also be noted that, in Decision No. KIN- 40/51985, dated May 22, 2002, the Department's deputy secretary concluded that even when the assessor finds that one of the four grounds cited above are met, there still must be evidence that there is a risk to the child cited in Wis. Stat. §48.13 if the child were to live with a parent. Essentially that decision ties together the first two conditions cited in *Wis. Stat. §48.57(3m)(am)*, that there be a need for the placement and that the child be at risk of harm that could lead to a Child In Need of Protection or Services (CHIPS) case. It also confirms that at least one of the criteria in the list at *Wis. Stat. §48.13* must be satisfied.

Chapter 938 of the Statutes deals with juvenile justice issues and juveniles involved in delinquencies who also need protection or services; Chapter 48 is entitled 'Children's Code' and is the relevant chapter for this case. The statutory citation referenced above – *Wis. Stat. §48.13*, which provides for jurisdiction over children alleged to be in need of protection or services – is relevant here and provides as follows:

The court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court, and:

- (1) Who is without a parent or guardian;
- (2) Who has been abandoned;
- (2m) Whose parent has relinquished custody of the child under s. 48.195 (1);
- (3) Who has been the victim of abuse, as defined in s. 48.02 (1)(a), (b), (c), (d), (e) or (f), including injury that is self-inflicted or inflicted by another;
- (3m) Who is at substantial risk of becoming the victim of abuse, as defined in s. 48.02 (1)(a), (b), (c), (d), (e) or (f), including injury that is self-inflicted or inflicted by another, based on reliable and credible information that another child in the home has been the victim of such abuse;
- (4) Whose parent or guardian signs the petition requesting jurisdiction under this subsection and is unable or needs assistance to care for or provide necessary special treatment or care for the child;
- (5) Who has been placed for care or adoption in violation of law;
- (8) Who is receiving inadequate care during the period of time a parent is missing, incarcerated, hospitalized or institutionalized;
- (9) Who is at least age 12, signs the petition requesting jurisdiction under this subsection and is in need of special treatment or care which the parent, guardian or legal custodian is unwilling, neglecting, unable or needs assistance to provide;
- (10) Whose parent, guardian or legal custodian neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child;
- (10m) Whose parent, guardian or legal custodian is at substantial risk of neglecting, refusing or being unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of the child, based on reliable and credible information that the child's parent, guardian or legal custodian has neglected, refused or been unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of another child in the home;

(11) Who is suffering emotional damage for which the parent, guardian or legal custodian has neglected, refused or been unable and is neglecting, refusing or unable, for reasons other than poverty, to obtain necessary treatment or to take necessary steps to ameliorate the symptoms;

(11m) Who is suffering from an alcohol and other drug abuse impairment, exhibited to a severe degree, for which the parent, guardian or legal custodian is neglecting, refusing or unable to provide treatment; or

(13) Who has not been immunized as required by s. 252.04 and not exempted under s. 252.04 (3).
§48.13, Wis. Stats.

In a nutshell, the placement must be in the best interests of the child and there must be a need for the placement as demonstrated by evidence of the child being a CHIPS or JIPS child or the likelihood that the child would be such if living with a parent.

Quite frankly, this case is messy in terms of both its history as well as available and credible evidence. Typically the burden of proof in a case lies with the party advocating a change in the status quo. Practically that means that if this is a discontinuance of benefits the burden lies with the agency. Conversely, if this is an application for benefits the burden of proof lies with the applicant, i.e., the Petitioner herein.

In this case, it is apparent that Petitioner was in some point receiving Kinship Care benefits. While it is not precisely clear when they were cutoff the most reasonable view of the history is that Petitioner was receiving the benefits until the agency received the report of the biological mother was living with Petitioner and at that point it initiated a reassessment of the case. That reassessment led to discontinuance as the agency made the determination that the biological mother was living with Petitioner. I am concluding, therefore, that the burden of proof lies with the agency.

The agency contention that the biological mother was living with Petitioner consists of two things. First, the report from the economic support agency indicated that the biological mother had an open FoodShare and Medicaid case using Petitioner's address. Second, the statement by the paternal grandmother indicating that to the best of her knowledge the biological mother was living with Petitioner.

As for the open benefits case, there is no bar to eligibility based upon the parent's receipt of other benefits such as Medicaid and FoodShare. See, *Wis. Stat., §48.57(3m)(e) and Wis. Admin. Code, § DCF 58.05*. As for the fact that they were issued using Petitioner's address, Petitioner testified that when the mother left the home of the paternal grandmother and did use her address because she had no other place to receive mail. The agency representative did allow that at some point the bio mom did change her address to Vliet Street.

The second basis for the determination that Petitioner does not qualify for Kinship Care relied on a statement from the paternal grandmother. As she was not at the hearing that statement is hearsay. The Division of Hearings and Appeals cannot make a decision based on uncorroborated hearsay.¹ Though her statement is somewhat corroborated by the open benefits case address there is nothing else in the record that can be used to buttress the statement.

The testimony of Petitioner was that the bio mom has not lived with her since 2008. She does not know the whereabouts of the biological mother. Contact with the mother has been sporadic at best. Her testimony was credible and supported by testimony from another adult daughter.

¹ The Wisconsin Supreme Court has ruled that hearsay is admissible in administrative proceedings. *Gehin v. Wisconsin Group Ins. Bd.*, 278 Wis. 2d 111, 133; see also, *Wis. Stat. § 227.45*. Nonetheless, the Court has also ruled that administrative bodies should never base findings solely upon uncorroborated hearsay. *Ibid.* See also, *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579 (Ct. App. 1987); and see, *Outagamie County v. Town of Brooklyn*, 18 Wis. 2d 303, 312 (1962).

Based on all of the above I am concluding that the available evidence is not sufficient to demonstrate that Petitioner is no longer eligible for Kinship Care for SB.

CONCLUSIONS OF LAW

That the burden of proof lies with the agency and its evidence is not sufficient to demonstrate that Petitioner is not eligible for Kinship Care benefits for SB.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency with instructions to restore Petitioner 's eligible for Kinship Care for SB backdated to August 1, 2012. This must be done within 10 days of the date of this decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

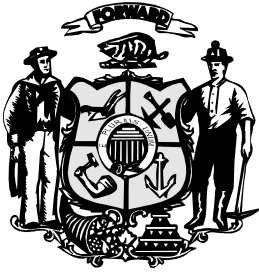
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Children and Families. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 201 East Washington Avenue, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 9th day of January, 2013

\sDavid D. Fleming
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on January 9, 2013.

Perez-Pena Limited
DCF - Kinship Care
DCF - Kinship Care